Supreme Court of the United States

October Term, 1941.

No. 893.

DOMINIC GALEOTA,

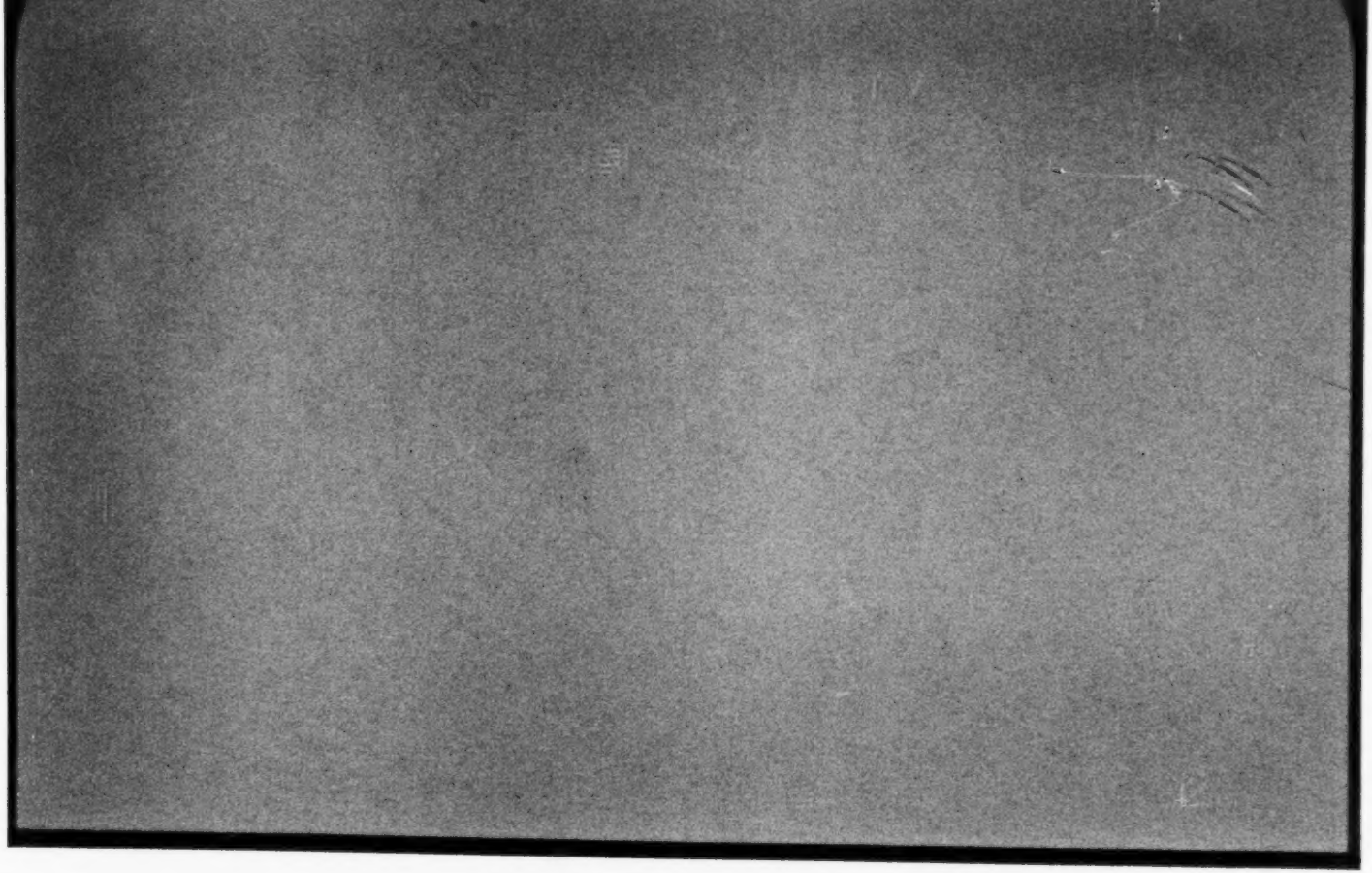
vs.

UNITED STATES OF AMERICA.

Brief of Respondent in Opposition on Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

WILLIAM L. CEAS,
Attorney for Respondent,
520 Powers Building.

THE REPORTER COMPANY, Inc., Washington, D. C.



Subject Index.

	Page
Citation of the Report of the Opinion in the Court Below	1-2
Statement of the Case	2-6
Questions Presented	6-7
Argument	7-14
Point (A)	7-11
Point (B)	11-14
Conclusion	14

TABLE OF CASES CITED.

Bellows v. Merchants Despatch Transportation Co., 257 A. D. 15, aff'd 283 N. Y. 591	3, 9, 12
Boyle v. Degnon-McLeon Construction Co., 47 A. D. 311, 61 N. Y. S. 1043	12
Brancoleone v. Northern Stevedoring Co., Inc., 224 A. D. 562, 231 N. Y. S. 489	12
Cleveland v. Laclede-Christy Clay Products Co., 113 S. W. 2nd 1065	10
Codigan v. Glens Falls G. and E. Co., 112 A. D. 751, 98 N. Y. S. 954	12
Cropper v. Titanium Pigment Co., Inc., 47 Fed. Rep. 2nd 1038	9
Dana, Admx., v. N. Y. C. & Hudson River R. R. Co., 92 N. Y. 639	13
Downing v. Oxweld Acetylene Co., 169 Atl. 709	10
Erie R. R. v. Tompkins, 304 U. S. 64, 58 S. Ct. Rep. 817	9
Evans v. Chevrolet Motor Co., 105 S. W. Rep. 2nd 108	10
General Lighterage Co. v. Hansen, 228 Fed. 497	12
Jacque v. Locke Insulator Corp., 70 Fed. 2nd 680, Certiorari denied 55 S. Ct. 99, 293 U. S. 585	3, 9, 12
Kreigh v. Westinghouse & Co., 214 U. S. 249, 29 Supreme Court Rep. 619	13
Krushoer v. Miller, 237 A. D. 518, 262 N. Y. S. 294	12
Langeneckert v. St. Louis Sulphur & Chemical Co., 65 S. W. Rep. 2nd 684	10
Martin v. Picher Lead Co., 21 Fed. Sup. 142	13
Mautsewich v. U. S. Gypsum Co., 164 A. D. 902, 217 N. Y. 593	12
Mehan, Admx., v. The Syracuse, Binghamton and N. Y. C. R. R. Co., 73 N. Y. 585	12
Pantzar v. Tilly Foster Iron Mining Co., 99 N. Y. 368	13
Pieczonka v. Pullman Co., 102 Fed. Rep. 2nd 132	11
Smith v. Wesel Manufacturing Co., 102 N. Y. S. 959	12
Welch v. Waterbury, 159 A. D. 509, 217 N. Y. 604	12

STATUTES CITED.

Section 200 of the Labor Law of the State of New York	7
Section 417 of the Labor Law of the State of New York	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 893.

DOMINIC GALEOTA

vs.

UNITED STATES GYPSUM COMPANY,
Petitioner.

Brief of Respondent in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The decision of the United States Circuit Court of Appeals, Second Circuit, in this action is reported at 123 Fed. Rep. 2nd 947.

Dominic Galeota for his brief in opposition to the petition of a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled action affirming the judgment of the United States District Court for the Western District of New York respectfully shows:

That the decision herein by the Circuit Court of Appeals for the Second Circuit is not in conflict with the decision of any other Circuit Court of Appeals in the same matters raised.

That the Circuit Court of Appeals for the Second Circuit in its decision herein has not decided any important question of local law in conflict with the applicable local decisions.

That there is no important question of Federal Law which has not been hitherto decided that should be settled by this Court.

That the decision of the Circuit Court of Appeals for the Second Circuit herein is not in conflict with applicable decisions of this Court.

That the Circuit Court of Appeals for the Second Circuit in its decision herein has not departed from the accepted and usual course of judicial proceedings nor has it sanctioned such a departure, thus there is no reason for this Court to exercise its power of supervision.

Statement of the Case.

This is an out and out negligence action brought by the plaintiff to recover damages for personal injuries sustained by him as a result of his employment by the defendant. The plaintiff established that he sustained injuries to his lungs by reason of having suffered a condition of the lungs known as pneumonoconiosis, fibrosis and silicosis, and that these injuries which are permanent, resulted from the conditions under which he worked while employed by the defendant because the defendant did not provide and maintain a reasonably safe place in which the plaintiff performed his work and that the defendant did not meet the requirements of the Labor Law of the State of New York.

The question of the defendant's negligence is not raised by the petitioner and in any event the issues of negligence, contributory negligence, and assumption of risk

were resolved in favor of the plaintiff, by the jury, under a proper charge of the Court under the law obtaining in cases of this nature.

Bellows vs. Merchants Despatch Transportation Co., 257 A. D. 15, aff. 283 N. Y. 591.

The Circuit Court of Appeals has reviewed the testimony regarding these items and affirmed the judgment.

May we point out at the outset that the defendant in an action of this nature at the October, 1934, Term, applied to this Honorable Court for a writ which was denied.

Jacque v. Locke Insulator Corp., 70 Fed. 2nd 680. Certiorari denied, 55 S. Ct. 99, 293 U. S. 585.

In that case the defendant had appealed from a judgment of Fifteen thousand two hundred thirty-nine dollars and fifty-six cents ($15,239.56) including interest, which judgment in favor of the plaintiff was rendered by jury in the Federal Court for the Western District of New York and which judgment was affirmed by the Circuit Court of Appeals for the Second Circuit and although reasons similar to the reasons now urged before the Court were there presented yet this Court refused the writ. This case like that one is a simple negligence action and involves no unusual questions either with reference to the law or with reference to the facts, and in view of the fact that this Court has previously denied a writ in a similar action, there is no reason to satisfy counsel's desire that the time of the Supreme Court of the United States be taken up with its review or in reading an extensive brief.

For a long period of time the plaintiff worked for the defendant as a driller in its mine and in the latter part of his employment from November 10, 1930, he worked in that portion of the mine known as 16 right and 15

left. In the spring of 1931 he worked drilling and blasting rock in the limestone quarry of the defendant and in the spring of 1933 for an additional period. The rooms off the haulageways in the mine were only 3 or 3 1/2 feet in height (p. 38) (Exhibit 1). The plaintiff used both an electric drill (Exhibit 3) and a jackhammer (Exhibit 3) (pp. 36, 37). His work was primarily to drill holes in the gypsum and rock so that charges of dynamite could be placed therein and the rock and gypsum blasted. It was necessary for him to use a jackhammer to drill the hard rock which was known as fire rock and *when this operation was carried on the dust was so thick that it looked like flour and this dust stayed in the atmosphere of the mine practically all day* (p. 42). *There was no dust trap on the jackhammer nor was there any hood or suction devices in these rooms to take away the dust nor was the plaintiff furnished any mask or respirator* (p. 43). When using the jackhammer, which he did sometimes 6 or 7 hours a day, it was necessary for him to stand within 2 1/2 to 3 feet from the rock (p. 46).

There was but one fan in this mine for the purpose of bringing in the air and that was located 2 or 3 miles from some places in which the plaintiff worked and when he worked this far from the fan the *air was bad and the ventilation poor and little of the smoke was removed* (pp. 150, 151). At times 4 or 5 others would be using a jackhammer at the same time and of course when this was done dust in the form of fog or clouds was created and remained in the atmosphere (pp. 56, 91). When drilling was done by the electric drill dust was created especially when the top hole was drilled and this *dust was so thick you could only see a man about 15 or 25 feet away* (p. 42).

During his work in the quarry he also used a jackhammer and this work necessitated his face being only about 2 to 2 1/2 feet away from the rock wall (p. 55). The only fan that was located in this mine was started *in the morning* at about 7 o'clock and was shut off at about 10:00 or 10:30 in the morning and yet this plaintiff was forced to work without any means being utilized to bring fresh air in this mine, thus causing him to feel weak and sick because he couldn't get fresh air. *The plaintiff did not know this dust was injurious to breathe and did not know the chemical composition of the rock nor did anyone inform him that this dust was injurious* (pp. 75, 76).

Whatever doors the defendant maintained in its mine across the haulageway for the purpose of keeping the air in the portion of the mine in which the men were working was permitted to remain open at various times thus allowing the air to escape rendering the doors of little effect (p. 352).

Pursuant to an order of the District Court, samples of the rock from the portions of the mine in which the plaintiff worked were taken and a chemical analysis made which revealed that these samples of rock, which of course had been subjected to the drilling processes and from which dust was created, as we have previously outlined, contained free silica ranging from 3/10% to 3.6% and the fineness of these particles ranging from 61% to 82% under 10 microns (breathable size) (pp. 125, 128).

The lay witnesses called by the plaintiff numbering four, clearly substantiated the testimony given by the plaintiff with reference to the conditions under which he worked daily in this defendant's mine.

Four physicians were called by the plaintiff to testify as to his injuries and as to the cause of these injuries. All *three of the medical experts called on the direct case testified that the plaintiff was suffering from a permanent injury or disease known as pneumonoconiosis or silicosis, which was caused by the plaintiff's inhalation of the dust created in the defendant's operation of its mine and quarry.* The facts established with reference to the working conditions were propounded to the experts in the form of hypothetical questions.

The verdict arrived at by the jury was fully justified both upon the basis of negligence and the medical proof. This evidence presented pure questions of fact and no unusual circumstances presented which would call for or justify intervention by the Supreme Court of the United States.

There are no errors in the record justifying a review by this Court. After a careful examination of the evidence and the circumstances surrounding the conduct of the trial this verdict in favor of the plaintiff has been sustained by the United States Circuit Court of Appeals for the Second Circuit unanimously, in a learned opinion by Justice Augustus N. Hand.

Questions Presented.

As previously pointed out the questions raised here are not unusual and are limited.

The questions raised by the petitioner are only two.

(1) Whether under the facts as herein stated the plaintiff established by a fair preponderance of the evidence that the conditions under which the plaintiff worked caused his injury.

(2) Whether or not the plaintiff was guilty of contributory negligence or assumed the risk of his employment as a matter of law.

ARGUMENT.

(A) The plaintiff established by a fair preponderance of the evidence that the conditions under which he worked caused his injury.

The plaintiff established from the analysis of the rock taken from the defendant's mine and the portions thereof where the plaintiff worked that this rock contained free silica ranging up to 3.6% and that during the entire working day there was present in the atmosphere of the workrooms in this mine clouds of dust.

Section 200 of the Labor Law of the State of New York provides:

> "General duty to protect health and safety of employees.—All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein. The board shall make rules to carry into effect the provisions of this section."

Section 417 of the Labor Law of the State of New York relating to mines, provides:

> "VENTILATION.—An air current sufficient to remove smoke and noxious gases and to insure the safety of every employee *shall be conducted along every passageway and working place.*"

As previously pointed out the drilling which this plaintiff did with both the electric drills and jackhammers created large quantities of dust and *this dust came from*

the rock containing the free silica. This without any stretch of imagination conclusively shows that the dust in this atmosphere caused from drilling the rock contained free silica and the concentration of this dust was described by all of the witnesses as being in the form of a cloud or fog.

Sections 33-2.3 and 33-2.21 of the Rules of the New York State Industrial Board as contained in Bulletin No. 33 set forth by the petitioner on pages 12 and 13 of the brief deals merely with outside drilling, and in no way applies to the plaintiff's employment in the mine and were not in force during plaintiff's employment and not adopted until some years thereafter. The concentration of this dust must have been high because there was a cloud of this dust in the atmosphere during the entire working day.

The plaintiff's medical witnesses stated with no uncertainty in response to questions embracing the evidence of the case as to the chemical analysis of the rock and the clouds of dust in the atmosphere that the plaintiff's condition was caused from the inhalation of this dust while working for the defendant.

The petitioner attempts to set a standard that would make it impossible for any plaintiff in an action of this nature to recover by saying in effect that before a recovery can be had in a case of this nature a dust count should be taken in a mine that has not been worked for a period of three or four years at the time the injuries were discovered and an analysis made of the dust. This would be tantamount to precluding recovery in actions of this nature regardless of the merits of the action.

These expert medical witnesses called by the plaintiff were satisfied from their expert knowledge relative to the effect of the inhalation of dust on the human lung,

that *the dust breathed by the plaintiff unquestionably caused his injury.*

It is well settled law that an expert may be permitted to state facts known to him because of expert knowledge though involving elements of inference.

Cropper vs. Titanium Pigment Co., Inc., 47 Fed. Rep. 2nd 1038.

In the case of

Jacque vs. Lock Insulator Corp. (*supra*),

in which case this Court denied a writ of certiorari it was held that the establishment of the fact that the plaintiff breathed clouds of dust and that certain materials containing free silica were used although no dust count or analysis of dust in the atmosphere was made or considered by the expert medical witnesses that was sufficient to establish the casual relationship between the employment and the injury.

The Court of Appeals of this State in the case of

Bellows vs. Merchants Despatch Transportation Co. (*supra*),

likewise held this sufficient.

This Court of Appeals case settled the law in this regard in the State of New York holding that this evidence was sufficient to establish the fact that the plaintiff's employment caused the injury and under the ruling of this Court in the case of

Erie R. Co. vs. Tompkins, 58 S. Ct. Rep. 817; 304 U. S. 64,

the Circuit Court is bound by that decision.

This rule is followed not only by this Court and by the Courts of the State of New York, but elsewhere throughout the nation and it has been uniformly held

by the Appellate Courts of various jurisdictions in refusing to set aside a verdict in favor of the plaintiff in actions of this nature that it was sufficient to establish the causal relationship between the injury and employment by showing that there were clouds of dust present in the atmosphere and by showing the kind of materials used in the operations and even in some cases no chemical analysis whatsoever was made as in this case, and the Courts have never gone so far as to hold that the plaintiff must establish as a separate fact that he was exposed to dusts which were harmful and injurious to him other than as here clearly established.

See:

Langeneckert vs. St. Louis Sulphur & Chemical Co., 65 S. W. Rep. 2nd 684.
Evans vs. Chevrolet Motor Co., 105 S. W. Rep. 2nd 108.
Cleveland vs. Laclede Christy Clay Products Co., 113 S. W. 2nd 1065.

However in this case the medical expert witnesses established by their testimony that the dust which the plaintiff breathed was harmful and injurious to him because they stated that the inhalation of this dust caused his injury.

The Supreme Court in New Jersey in upholding a verdict for the plaintiff in an action of this nature in the case of

Downing vs. Oxweld Acetylene Co., 169 Atl. 709,

held that where the agency is present regardless of the amount and there is evidence showing that the man contracted disease as a result of an agency of that nature, it is not necessary for the plaintiff to establish the concentration of the agency in the atmosphere. We respectfully call this Honorable Court's attention to the opinion

delivered by the Justice of the Court at pages 710 and 711.

The Circuit Court of Appeals for this Circuit has previously passed upon many of these questions in an action of this nature.

See:

Pieczonka vs. Pullman Co., 102 Fed. Rep. 2nd 132.

It is interesting to note that the petitioner cites no authority under this point to substantiate his contention.

(B) The plaintiff was not guilty of contributory negligence or assumption of risk as a matter of law, these being purely jury questions which were resolved by it in favor of the plaintiff.

The question of the plaintiff's contributory negligence or assumption of risk was submitted to the jury under proper charge of the Court to which charge the attorney for the defendant took no exception and made no requests to charge.

The Court specifically pointed out to the jury that the law required the plaintiff to exercise reasonable care and caution and that if he knew this dust which he was inhaling from time to time was affecting his lungs and continued to work there with that knowledge, that they should consider this in determining whether or not the plaintiff had used reasonable care and caution to protect himself (pp. 386, 387).

The plaintiff testified that he did not know the chemical composition of this rock and that no one connected with the defendant or anyone else ever told him that this dust was bad to breathe (pp. 75, 76).

Apparently the defendant takes a position that since the plaintiff testified that he began to cough before he left the defendant's employ and that when the fan was turned off he felt sick and couldn't get much air that these facts constituted assumption of risk as a matter of law. This is not true and the defendant in the case of

Bellows vs. Merchants Despatch Transportation Co. (*supra*)

urged before the Court of Appeals as here that the plaintiff assumed the risk because he had in substance testified that the dust created, choked him and affected him, yet the Court of Appeals unanimously sustained the verdict in favor of the plaintiff.

It is well settled law in the State of New York that an employee assumes only those risks that are obvious and known to him.

Jacque vs. Locke Insulator Corp. (*supra*).

Furthermore it is the province of the jury in cases of this kind to determine whether or not a plaintiff has been guilty of contributory negligence or has assumed the risk of his employment.

Brancoleone vs. Northern Stevedoring Co., Inc., 224 A. D. 562; 231 N. Y. S. 489.
Smith vs. Wesel Manufacturing Co., 102 Fed. Rep. 2nd 132.
Krushoer vs. Miller, 237 A. D. 518; 262 N. Y. S. 294.
Boyle vs. Degnon-McLeon Construction Co., 47 A. D. 311; 61 N. Y. S. 1043.
Mehan, Admx. vs. The Syracuse, Binghamton and N. Y. C. R. R. Co., 73 N. Y. 585.
Codigan vs. Glens Falls G. and E. Co., 112 A. D. 751; 98 N. Y. S. 954.
General Lighterage Co. vs. Hansen, 228 Fed. 497.
Mautsewich vs. U. S. Gypsum Co., 164 A. D. 902, 217 N. Y. 593.
Welch vs. Waterbury, 159 A. D. 509; 217 N. Y. 604.

We can go further than this and now say that it is undoubtedly the law that since the jury found that the defendant had been negligent in the operation of its mine and quarry and had failed to discharge its duty toward the plaintiff, that the plaintiff could not be guilty of contributory negligence or assume the risk of his employment, under its rule laid down both by the Court of Appeals of the State of New York and by this Court in a long line of case law.

An employee does not assume the risk of his employment until after the master has discharged his duty of reasonable care to prevent such risk and he does not assume the peril arising from the negligence of the master, by the master's violation of a duty placed upon it by statute.

See:

Dana, Admx., vs. N. Y. S. & Hudson River R. R. Co., 92 N. Y. 639.
Pantzar vs. Tilly Foster Iron Mining Co., 102 Fed. Rep. 2nd 132.
Martin vs. Picher Lead Co., 21 Fed. Sup. 142.
Kreigh vs. Westinghouse & Co., 214 U. S. 249; 29 Supreme Court Rep. 619.

Mr. Justice Day in the *Kreigh* case said:

> "The duty of the master to use reasonable diligence in providing a safe place for the men in his employ to work in and to carry on the business of the master for which they are engaged has been so frequently applied in this court, and is now so thoroughly settled, as to require but little reference to the cases in which doctrine has been declared * * *. *The employee is not obliged to examine into the employers' methods of transacting his business, and he my assume that reasonable care will be used in furnishing appliances necessary to carry on the business* * * *.*
>
> *Nevertheless, the duty of providing a reasonably*

safe place for the carrying on the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character * * *.

There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer" (Italics ours.)

Here the master had not discharged its duty and the plaintiff is not charged with contributory negligence or with assuming the risk of his employment and in any event it was purely a jury question which was submitted to them under a proper charge of the Court.

Conclusion.

It is therefore submitted that the plaintiff clearly established by a fair preponderance of the credible evidence that he suffered injury due to the conditions under which he worked, and that his injury was a result of the *inhalation of dust containing silica, which he was compelled to breathe because of the defendant's negligence.*

It is also submitted that the question of the plaintiff's contributory negligence or assumption of risk were questions which were rightfully determined by the jury in his favor and that any risk attendant to his employment were not obvious to him and were unknown, and since the master failed to discharge its duty the defenses raised by them must fall.

The questions raised by the petitioner are questions that have again and again been determined by the Federal Courts and the Courts of the State of New York, and there is nothing raised on this petition that warrants the consideration of this Court.

WILLIAM L. CLAY,
Attorney for Respondent.

Dated, February 7, 1942.